No. 12,242

IN THE

United States Court of Appeals

For the Ninth Circuit

OVE FOG,

Appellant,

vs.

R. C. WILLIAMS & CO., INC.,
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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INTRODUCTION.

This case involves no complicated issues of law. The only evidence is the testimony of plaintiff and the documents offered in evidence by both parties on the examination of plaintiff as a witness.

There was a dispute between the parties hereto as to whether plaintiff was entitled to receive commissions on sales of Harwood whiskey, which was engaged in for over two years and very persistently and firmly by plaintiff as will hereinafter appear. That dispute ended in a settlement in which plaintiff asked for and received $10,000—in compromise of his claim. That settlement was made on *March 8, 1946.* This action was filed June 11, 1948 (R. 9).

Plaintiff seeks to set aside the settlement on the ground that he was induced to enter into it, by misrepresentations of defendant's officers; and that he did not know that the representations were false, until shortly prior to the filing of this action.

The rule as to cases of this character is set out in some detail in *Oppenheimer v. Clunie,* 142 Cal. 313, 314 and 315. The rule there expressed requires that a Court shall not set aside a contract made, except upon "clear and decisive proof." This case does not require the application of that rule because the evidence shows that plaintiff not only was not misled on a material issue, but was not misled at all.

Correction of False Impression in Appellant's Brief.

Since appellant in his opening brief sought to create the impression that defendant corporation R. C. Williams & Co., Inc. and its subsidiary, for which plaintiff worked, are one and the same (on the top of page 5 of the brief, appellant's counsel refer to the subsidiary as a "desk" of R. C. Williams & Co.), it might be well, at the outset, to set up the relationship as it appears on the record.

Defendant R. C. Williams & Co., the parent concern, has, and during all of the times involved had, its place of business at 265 Tenth Avenue, New York City (R. 116). Its president was at all times herein mentioned Hugo F. Jaburg.

The wholesale liquor division of defendant corporation carried on its business at the office of the company

at 265 Tenth Avenue (R. 116), and Irving Koerner was its manager (R. 116).

Maintaining independent offices, at *610 Fifth Avenue,* many blocks from the offices of the defendant corporation (the parent company which as above stated were situated at 265 Tenth Avenue) was a division of defendant corporation which changed its title twice. It was originated as Continental Import Division (R. 96) and wound up as *"Williams Importers"*. Jean Ravaud was its general manager (R. 86), and Geo. M. Ackerman, Assistant Manager (R. 99). This was the division which hired plaintiff Fog, and in November, 1942, gave him the percentage deal under which he worked (Plaintiff's Ex. 3, R. 91).

This distinction is important only because appellant in his brief seeks to make the two departments one, so that, when he charges either his senior officer, Ravaud, who is writing about Continental Import or Williams Importers, and is not an officer or manager of the business of defendant corporation which it carries on under its own name on Tenth Avenue, or Ravaud's assistant Ackerman with making statements beginning with the pronoun "we", this Court will consider he was talking about defendant corporation, when as a matter of fact his remarks are as to his own division. For example, on page 12 of plaintiff's brief in this appeal, we find plaintiff's counsel referring to two letters, one of October 21, 1944, from Ravaud to plaintiff (Plaintiff's Ex. 6, R. 104), and the other of October 27, 1944, from Ackerman to Plaintiff (R. 108). In each of those letters the writer uses the

pronoun "we", and is very obviously referring to the import division, which was plaintiff's employer, and not to defendant corporation.

Appellant admitted from the witness stand that, until the dispute over Harwood whiskey arose, he never did any business of any kind with the parent company (R. 204).

Depositions in Record Are Not Properly a Part Thereof.

Since the cause was decided on the termination of plaintiff's case, the only evidence on the record is that introduced by plaintiff. There is in the printed "Transcript of Record" the deposition of Hugo F. Jaburg, President of defendant corporation, and Jean Ravaud, head of the branch of defendant corporation, by which plaintiff was employed. These were placed on the printed record at the instance of plaintiff, but are in fact no part of the true record on this appeal, as they were never offered in evidence by either party. However, appellant's counsel has seen fit to make use of them in his argument. (See appellant's brief, pp. 17, 19.)

THE ORDER OF ARGUMENT IN THIS BRIEF.

Ordinarily one can look to the complaint of plaintiff to determine what his cause of action is and the ultimate facts which he hopes to prove to entitle him to judgment.

If plaintiff is held to his pleading, his case is hopeless because he was forced to admit from the witness

stand (as we shall later show) that every material allegation in the complaint as to fraud is false.

Confronted with a lack of proof, he switched to a different theory, namely, that while he knew defendant corporation was the importer and distributor of Harwood in the United States and in this territory, and was making a dollar a case profit thereon, he did not know that its written contract was with the distiller's agent instead of with the distillery direct, and he didn't know that its compensation was through a $1.00 per case mark up of the goods, rather than a $1.00 per case commission, and that these facts were withheld from him.

We shall, therefore, first present the set up of the dispute and the settlement, and then discuss (1) the lack of any evidence to sustain plaintiff's cause as pleaded, and (2) the lack of evidence to support the claim as he sought to develop it at the trial.

HOW THE DISPUTE AROSE.

On his direct examination plaintiff testified as to his original contract with *Continental Import Division* of defendant corporation. It was oral and was with Mr. Jean Ravaud, the general manager of the division. He testified he was to receive a guarantee of $4,200.00 a year, and Ravaud was to work up a schedule (to quote plaintiff)

> "for the commission I was to receive for whatever *business I did in my territory* which, of course,

was the most important part of the income I was looking forward to receiving." (R. 83.)

In November, 1942, plaintiff received from Mr. Ravaud the schedule of commissions which varied from 10 cents a case up to 5,000 cases, to 25 cents a case for all over 15,000 cases (Plaintiff's Ex. 3, R. 91.)

In July, 1943, R. C. Williams & Co. shipped some two carloads of rum into plaintiff's territory, without sending it through plaintiff's office (R. 92). Plaintiff protested and Mr. Ravaud promised to take it up with Mr. Jaburg, President of the defendant corporation, and later reported back to plaintiff that Mr. Jaburg said it was a mistake, and that it wouldn't happen again and that no merchandise would be shipped into this territory except through plaintiff's office (R. 94). That was a gratuitous action on Jaburg's part, since as plaintiff testified his contract only involved the "business *he did* in his territory" (R. 83).

Plaintiff did well on his job with the Import Division. He quit a job at Schenley's where his salary was $400 or $500 (R. 242), plus a bonus at the end of the year which he never received because he didn't remain on the job that long (R. 242). He went to work for Continental Import Division for a guarantee of $350 and commissions. In 1943 and 1944, the least he earned was $21,000 (R. 243).

By 1944 the whiskey shortage was getting serious. We don't know whether it would be proper for us to suggest that the condition was so general that the Court might take judicial notice thereof. At any rate,

the demand for whiskey was so great (as plaintiff testified on cross-examination) that:

> "Everybody wanted whiskey and couldn't get it. If you had whiskey, you could make them take a lot of other things along with it." (R. 240).

In other words, if plaintiff's division could sell whiskey, they could force the wholesaler to take a lot of items such as wines, foreign rums and the like *in return for the privilege of being permitted to purchase whiskey.*

In fact, plaintiff on cross-examination complained that he lost sales of carloads of merchandise because he couldn't supply Harwood whiskey (R. 240).

Plaintiff admitted that Jaburg advised him that he was trying to induce the distillers to handle Harwood through plaintiff's division and that he (plaintiff) has no reason to doubt that information.

Plaintiff also admitted that he never heard any insinuation even that defendant corporation had any salesmen in plaintiff's territory selling Harwood (R. 227).

Defendant's Contracts With Distillery Agent.

When the situation was thus, defendant corporation made a contract with the distiller's agent involving Harwood whiskey. The first contract is dated April 18, 1944, and it is in evidence as plaintiff's Ex. 20 (R. 270 et seq.). The contract was between defendant corporation and Agencias Distiladores, exclusive agent of the distillery which makes Harwood (R. 271), and,

after providing for sales by defendant corporation to its retailers in New York City, it fixes a sales price to wholesalers, outside of New York City of $20.77 F.O.B., Vancouver, made up of the following items:

(a) Cost of $19.05

(b) Script stamps of 12 cents, and

(c) Profit of $1.60 (R. 275),

and it provides that the profit of $1.60 a case shall take the place of "commissions, allowances or remuneration for its efforts and services" (R. 273).

Defendant corporation then made a separate and supplemental agreement with the distillery's agent which took from defendant corporation 60 cents of the $1.60 profit. The contract is dated April 20, 1944. While it is dated 2 days later than the first contract (Plaintiff's Ex. 20), it is without doubt all a part of an identical transaction. It will be observed that the signing of the first contract by the Distillery Agent was on May 8th. (R. 280.)

Under this supplemental agreement, defendant corporation was required to pay a

> "brokerage or selling commission of not in excess of 60 cents a case to brokers or selling agents selected by it, but no such broker or selling agent will be selected by the agent *unless and until the written approval of the supplier is first obtained as to such broker or selling agent.*"

That is what Mr. Ackerman was talking about in his memo of October 20, 1944, to Fog (Plaintiff's Ex. 7), when he said that:

"Actually our company has nothing to do with the sales representations of this item. All sales were made by the representatives of the distillery and at their terms." (Plaintiff's Ex. 5, R. 102.)

Plaintiff Wanted Defendant to Pay Double.

With no sales resistance; with defendant corporation compelled under their Harwood contract to pay commissions to the distiller's agents, although defendant assumed the burden of importation and invoicing; with no sales burden on the Division which employed plaintiff, it is no wonder that defendant corporation did not consider itself bound to pay an additional commission to plaintiff; and, by the same token, it is not surprising that plaintiff wanted a commission, without any work of any kind to be done by him.

The correspondence in the record shows that plaintiff very persistently and forcefully pleaded his cause to the officers of his Division and of defendant, the parent company.

PLAINTIFF'S PLEADED CASE AND FAILURE OF EVIDENCE TO SUPPORT IT.

Appellant pleads a dispute. In paragraph VIII of appellant's complaint (R. 4 and 5) he alleges:

"For a period of more than one year prior to March 8, 1946, a controversy pended between plaintiff and defendant corporation over the question of the payments of commissions to plaintiff, * * * for Harwood's whiskey imported and

sold by defendant corporation in the western division assigned to plaintiff."

He also pleads a compromise settlement. He alleges that the dispute was compromised and settled on March 8, 1946, by the payment to plaintiff of $10,000.00, and by plaintiff's signing of a release (which is in evidence as part of plaintiff's Exhibit 17, and will be found on pages 172 to 173 of the Record). Plaintiff pleads the settlement in the following language:

> "On or about *March 8th, 1946,* defendant corporation * * * offered to pay plaintiff the sum of $10,000.00 in full settlement of plaintiff's claim that he was entitled to commissions * * * on the sales of Harwood's whiskey sold and delivered by or through defendant corporation in said Western Division area.
>
> and finally that
>
> "Plaintiff * * * accepted the offer of settlement so made him and defendant did thereupon pay to plaintiff the sum of $10,000.00."

Of course, in the absence of fraud on the part of defendant corporation or mistake, that settlement disposed of the controversy.

However, plaintiff seeks by this action to set aside the settlement on the ground that it was procured by certain misrepresentations on the part of officers of the defendant corporation.

According to *the complaint,* plaintiff's ground for asking the trial court to set aside the said settlement was that:

(1) "Defendant corporation falsely and fraudulently and for the purpose of deceiving and misleading plaintiff represented and maintained that defendant corporation *had nothing to do with the importation or sale of said Harwoods* whiskey in said Western Division area." (Complaint par. VIII, R. 5.)

(2) Defendant corporation also "made repeated statements * * * that defendant * * * was not receiving any compensation for the sale of such whiskey in said area."

and that

"Plaintiff would never have agreed to the settlement so offered by defendant nor would he have accepted the sum of $10,000.00 paid him by way of settlement of his claim for commissions on the sale of Harwood's whiskey, if he had not believed the representations made to him by defendant *that defendant corporation had nothing to do with the sale and distribution of Harwood's whiskey in said Western Division.*" (Complaint Par. IX; R. 6.)

Plaintiff follows these allegations of fraudulent misrepresentation with a plea of late discovery, charging that he

"never discovered that the statements and representations made to him by defendant to the effect that defendant corporation had nothing to do with the sale and distribution of Harwood's whiskey in the said Western Division, and that it had not demanded or received *any commissions or compensation* for sales of such whiskey so imported and sold, were false and untrue until the

month of January, 1948". (Complaint Par. XI, R. 6 and 7.)

If we accept appellant's pleading as the groundwork of his claim, and if the evidence shows that plaintiff at the time of the settlement knew that defendant corporation had had *something to do* with the "importation or sale of said Harwood's whiskey", and knew defendant corporation was receiving commissions or compensation for sales of such whiskey," then the settlement determined appellant's cause.

Did Appellant Know Before March 8, 1946, That Defendant Had Something to Do With the Importation or Sale of Harwood Whiskey?

At the trial, appellant testified on direct examination that, in the fall of 1944, he learned from a local wholesaler that Harwood was available in this territory and Williams & Co. (defendant) was the importer. (R. 94-95.)

On October 18, 1944, plaintiff wrote Ravaud that he had just learned that defendant corporation had confirmed by telephone the sale of 4 carloads of the whiskey to Abrams Co. (R. 97, Plaintiff's Ex. 4.)

On October 20, 1944, Ackerman wrote plaintiff enclosing a form letter for Plaintiff to send to customers, "giving you the terms and conditions of the sale of Harwood Whiskey". (Plaintiff's Ex. 5, R. 101.) In the same letter, Ackerman says that the distributor

had agreed to "honor our recommendations in accordance with their ability to deliver." (R. 102.)

On October 21, 1944, Ravaud wrote plaintiff that defendant corporation "has exclusive" for New York City provided it accommodate the Canadian Distilleries by clearing the merchandise for them and doing the billing in the U.S. (Plaintiff's Ex. 6, R. 106.) In the same letter he gives plaintiff right to sell some Harwood to Bohemian Distributing Co. (R. 106.)

On December 12, 1944, Ackerman wrote plaintiff that he had "learned that Irving Koerner is definitely in charge of shipments from the distillery", and he suggests that any of defendant's good customers who want any information about Harwood whiskey should contact Koerner (R. 117) and says that he understands that the "distillery only ships after getting O.K. from Mr. Koerner". (R. 117.)

On February 2, 1945, plaintiff writes Fog that he has accidentally discovered that "R. C. Williams & Co. were sending an additional 4 cars of Harwood's whiskey to Los Angeles." He further says that he knows that Parrott & Co. did not use previous shipment of Harwood for "good distribution of Williams Importers, different items." (R. 120.)

In the same letter (Plaintiff's Ex. 9), plaintiff comments on the fact that the bottles are marked "Imported by R. C. Williams & Co." (R. 121-122.)

On February 3, 1945, Ravaud by letter (Plaintiff's Ex. 10) informs plaintiff that Koerner had confirmed

4 cars for February to Parrott & Co., and assures plaintiff that "we will see that" Sierra gets a car. (R. 123-124.)

In his letter of February 6, 1945, Ackerman advises plaintiff, with reference to plaintiff's request that Sierra Wine & Liquor Co. be sold some Harwood, stating that Koerner "will be glad to accept their order", but it must be on same terms as sales to Parrott, viz. letter of credit, etc. (Plaintiff's Ex. 11, R. 128.)

Heretofore we have discussed only the information plaintiff received from correspondence which he offered in evidence on direct. We now come to his cross examination.

He admitted he knew as early as 1944 that, if any customer of his wanted any Harwood whiskey, it had to come through R. C. Williams & Co. (R. 198-199.)

He knew in 1944 and 1945 that "any of the whiskey that came into this community cleared through Mr. Koerner", and that Ackerman had told him that Koerner was the man to see in connection with the purchase of Harwood whiskey. (Plaintiff's Ex. 8, R. 117 and 208.) He knew *that* a year before the settlement.

In a meeting in New York in September, 1945, Jaburg suggested the dispute be submitted to arbitration, so some time later plaintiff prepared a statemen for submission to an Arbitration Board, made, of course, before the settlement, which he headed

"To whom it may concern". (Plaintiff's Ex. C, R. 253, et seq.) In that statement he said:

> "Beginning in the autumn of 1944, the wholesale liquor division of R. C. Williams & Co., Inc. made direct shipments into my territory of Harwood's Canadian whiskey, an absolute violation of their agreement with me". (R. 254.)

Of course, neither plaintiff nor his able counsel can reconcile the above testimony with the essential allegation of the complaint that plaintiff believed that defendant corporation had "nothing to do with the importation or sale of said Harwood's whiskey in said Western Division area." (R. 5.)

Did Plaintiff Before March 8, 1946, Believe That Defendant Corporation Was Not Receiving Any Compensation For the Sale of Such Whiskey in Said Area?

Plaintiff pleads that he was induced to settle because defendant "falsely and fraudulently * * * denied that it had demanded or received any commissions on sales of such whiskey so imported and sold in said area." (Complaint, Par. VIII, R. 5.)

Plaintiff on *page 12* of his brief quotes the following from a letter dated October 21, 1944, sent him by Mr. Ravaud:

> "As you know, we are not making any money at all on the Canadian whiskey, and outside of a moral obligation, I have been glad to obtain the merchandise for Parrott & Co. having in mind they will use the whiskey to push our other items." (Plaintiff's Ex. 6, R. 105-108.)

On his cross-examination, plaintiff testified that his claim that he was told by Williams & Co. that it was not making any money on Harwood was based upon that letter. And, in his brief, he follows that, with reference to a similar letter of Mr. Ackerman to him, which is dated October 27, 1944, in which Mr. Ackerman wrote that "We (inadvertently plaintiff's counsel substituted 'they') have nothing to do with the settling of the terms, any more than we had anything to do with the sale of the whiskey." (R. 109.)

Plaintiff's counsel interprets the "we" in each of those letters as referring to R. C. Williams & Co., the defendant corporation. Of course, plaintiff himself knew better. Messrs. Ravaud and Ackerman were respectively manager and assistant manager of the business conducted at 610 Fifth Avenue, under the name and style of "Continental Import Division of R. C. Williams & Co.", and later as "Williams Importers" (R. 161, 173, 177 and 180). When they used the personal pronoun with reference to their business, they were referring to their own business not the business carried on by R. C. Williams & Co. over on Tenth Avenue.

Even had plaintiff been misled by the use of the word "we" in those letters, he was soon disillusioned, for on February 6, 1945, Mr. Ackerman wrote plaintiff (Plaintiff's Ex. 11, R. 127-128), discussed the entire Harwood situation with him, related his efforts to get R. C. Williams & Co. to give plaintiff's division distribution of Harwood in this territory, and said that

he had even expressed to defendant corporation a willingness to make no commission charge, so that the division could push their other merchandise by including some whiskey, which all wholesalers were trying to get. And finally he commented that:

> "R. C. Williams & Co. and any or all of its divisions *do not make more than $1.00 per case on all of the Harwood that is sold,* except on that amount which is wholesaled here in New York City."

Plaintiff didn't overlook that statement in Mr. Ackerman's letter, because we find him on February 13, 1945, in answering Ackerman's letter, quoting from it the reference to the $1.00 per case profit. He then calculates the per carload profit at $1,650, and objects to the refusal to pay him his commission saying:

> "Your office seems to ignore the fact that our company is making $1650 net profit for each car sold, and in the same breath I am asked as a good fellow to give up my right to a commission on deals transacted on this item in my territory, which in my opinion is overshooting a little" (R. 134).

And later on in the letter, plaintiff says:

> "In this case, R. C. Williams is making some good money on Harwood whiskey. The only trouble appears to be that, after that profit is made, the fight is on as to who is going to have what" (R. 136).

In the following month Mr. Ravaud wrote plaintiff (Plaintiff's Ex. 13, R. 141 et seq.):

> "It is true R. C. Williams is making $1.00 a case gross profit, but even if it sounds paradoxical, it is not Williams Importers, and you are working for Williams Importers. As a matter of fact, I am working for Williams Importers and I have nothing to do with the sales of R. C. Williams" (R. 145).

On cross-examination he admitted, perforce, that he learned from the February 6th letter (Plaintiff's Ex. 11) that defendant corporation was making a dollar a case on Harwood whiskey distribution (R. 204-5). And that was over a year prior to the settlement. And he also admitted on cross-examination that he doesn't know *now* whether Williams and Co. were making any more than $1.00 (R. 205) which is significant because plaintiff was the only witness in the case.

The Parties Dealt at Arm's Length in the Negotiations.

In his memo to Mr. Ravaud of February 2, 1945 (Plaintiff's Ex. 12, R. 131) plaintiff complained that he was entitled to commissions on Harwood sales, saying:

> "It seems logical to me that I am entitled to commissions even if Williams Wholesale Division does not want to take advantage of my services but prefer to handle sales through outside channels" (R. 121).

and he winds up his letter:

> "If you are of the opinion nothing will be done, would you kindly inform me and I shall consider this intolerable situation of Harwood's whiskey closed" (R. 121).

And on February 13, 1945, he wrote Mr. Ravaud:

> "I have a working agreement with you on a commission basis which would entitle me in this instance to 25 cents per case on all Harwood whiskey already shipped or coming into this territory, and I am at loss to see where any sound reason has been advanced for changing this agreement beyond the thought that I would be a good fellow to do so" (Plaintiff's Ex. 12, R. 134-5).

In September, 1945, plaintiff went to New York, and, in a conference with Mr. Jaburg, he asked Jaburg why he wasn't entitled to a commission on Harwood whiskey, and Jaburg replied "because *Williams Importers* didn't handle it" (R. 148). Plaintiff then brought up the matter of a "gentlemen's agreement" to the effect that defendant corporation would not ship any merchandise into this territory except through plaintiff's division (R. 148).

Jaburg Demonstrated His Fairness in Negotiation.

This so-called "gentlemen's agreement" grew out of the following circumstances—in 1943 defendant corporation shipped a couple of carloads of imported rum into the western territory. Plaintiff learned about it and complained because it did not come

through his office (R. 93). Ravaud took the matter up with Jaburg, and Jaburg gave assurance that such would not happen again (R. 94). There is nothing in the record to show that it was other than an ordinary sale in which defendant corporation would not be obliged to make commissions thereon to other than its own salesman.

When plaintiff reminded Jaburg of this in the September, 1945 meeting he asked Jaburg if he would confirm the statement in writing. Jaburg said "Oh, yes, but *that was a different deal.* We don't sell it" (R. 148). And *it was a different deal,* unless on the rum shipment defendant corporation had to pay the salesman's commissions to others than its own salesmen, and plaintiff offered no evidence that such was the case. There is nothing to show that at the time of the rum shipment there was no need to sell rum, or that it sold itself, or that the manufacturer insisted on its salesmen being paid by the distributor, etc.

However, in a fine gesture of fairness, and despite the fact that he denied the justice of plaintiff's claim, Jaburg on September 13, 1945, furnished plaintiff with a letter confirming that "in a conversation held in December, 1943" * * * he gave plaintiff his verbal assurance that no merchandise would be shipped into plaintiff's territory by defendant corporation "except through Continental Import Division, now Williams Importers" (Pltf's. Ex. 14, R. 150).

Plaintiff Decides on Arbitration and Prepares a Statement.

Following that Jaburg recommended arbitration, and plaintiff asked for time to consult his attorney. He decided on arbitration which was delayed by the absence of Jaburg and Ravaud in Europe. He prepared Exhibit "C" (R. 253), as a statement of his case to be presented to the Arbitration Board.

He Quotes His Attorney's Opinion and Talks About a Law Suit.

As late as February 15, 1946, plaintiff wrote Jaburg, stating that "to remove any remaining doubts" in his mind, he had put his case before his attorney, and he quotes his attorney as favoring Court action.

THE MAKING OF THE SETTLEMENT.

Then followed the final conferences with Jaburg, which were held around February 25, 1946 (R. 154). Plaintiff, in relating the conversation, credited Jaburg with again saying that plaintiff had no valid claim for commissions on Harwood, and he says that, in reply, he (plaintiff) suggested a friendly civil suit (R. 154-5), and the talk wound up with plaintiff being left to decide for himself whether it would be a law suit or arbitration or a forgetting of his claim. He testified: "It was for me to make up my mind and I had to leave an answer" (R. 155). He then returned to Jaburg saying (according to his testimony on direct) that "from his (Jaburg's) assurance to me, I understand I have no commission in Har-

wood," and he asked for $10,000 to make a tax payment, on the ground that he suffered in his trade in not having Harwood whiskey with which to entice customers to buy other merchandise he was selling (R. 155).

After some consideration, Jaburg agreed to pay the $10,000 (Plaintiff's testimony R. 155, R. 170-173), and Ravaud sent plaintiff the settlement letter and release form dated March 8, 1946, which is in evidence as Plaintiff's Ex. 17 (R. 171 et seq.). Plaintiff tried to get its terms changed by submitting a counter proposition and trying to raise the settlement payment by $3,200, the amount which plaintiff owed defendant corporation for moneys theretofore loaned him (Plaintiff's Ex. 18, R. 180-181; 182-183). Defendant corporation remained adamant, and plaintiff signed the full release, which will be found on pages 172 and 173 of the record, and the new contract, which is set out on pages 173-175.

It is significant that in the settlement letter (Plaintiff's Ex. 18) Ravaud writes:

> "Having previously advised you that *Williams Importers* has nothing to do with this product."

He does not say defendant corporation had nothing to do with Harwood whiskey, but that the division which plaintiff worked for, viz., *Williams Importers,* had nothing to do with it; which, of course, was the ground of plaintiff's complaints at all times.

PLAINTIFF'S EFFORT TO AVOID THE SETTLEMENT AND HIS CLAIMED NEWLY DISCOVERED EVIDENCE.

Plaintiff's counsel is too able to realize that plaintiff's testimony reveals such a thorough knowledge of the method in which Harwood's whiskey was handled in this territory, as far as defendant corporation's connection therewith, which is fatal to plaintiff's recovery in this action.

However, plaintiff, in his evasive testimony, gave his counsel an idea, which he develops on pages 19 to 23 of his brief. This new theory is that, even though at the time of the settlement, plaintiff knew that the Harwood whiskey was coming into this territory, believed defendant corporation was shipping it into this territory, and knew that defendant corporation was importing it and invoicing the sales to wholesalers, and was thereby making $1.00 a case for their services, and knew that if any of the customers wanted Harwood they should contact Koerner, nevertheless the settlement should be set aside because defendant's representatives withheld from plaintiff the fact that defendant's contract was with an agent of the distiller instead of with the distiller direct, and that the $1.00 a case was reached by a mark up in price instead of by way of a percentage commission.

The Claimed False Representations.

On page 18 of appellant's brief, his counsel gives the statements which he contends constitute the inducing false representations. They are:

(1) "R. C. Williams did not sell Harwood but only handled is as a matter of accommodation for the distillery."

(2) "All sales were made by distributors for the distillery and R. C. Williams merely did the clearing and billing for which it received $1.50 a case out of which R. C. Williams had to pay the brokers for the distillery their commissions."

(3) "They netted not more than $1.00 per case."

(4) "The agreement was by contract with U.D.L.(the distillery in Vancouver) in consideration for the privilege of wholesaling Harwood in the N. Y. Metropolitan area."

There Was No False Representation.

Nowhere in the Record is there the slightest evidence establishing the falsity of any of the foregoing representations.

(1) On October 20th, 1944, one year and four months prior to the settlement, Geo. Ackerman of Continental Import Division of defendant corporation sent plaintiff a copy of a form letter he was sending out to distributors, and he offered to send the letter to any of the distributors in plaintiff's territory. The form letter said in part:

> "Several of our distributors have written to us about Harwood Canadian whiskey, as R. C. Williams' name appears on the bottle as *the sole U.S. distributor importer*" (R. 101-102). "Actually

> our company has nothing to do with sales representation of this item. All sales were made by representatives of the distillery, and at their terms." (R. 102).
>
> "As a service to the Canadian Distillery, R. C. Williams & Co., 265 Tenth Avenue, New York City, merely clear all U. S. sales for them and serve as a wholesaler in New York City for this product." (R. 102).

The letter then goes on to say that, in several instances, Williams & Co. were embarrassed in not being able to take care of their customers, and then says:

> "We explained this to the distillery. Therefore, they have agreed *to honor our recommendations in accordance with their ability to deliver,* and still in accordance with their terms." (R. 102).

Then is given the terms. And the letter closes with the statement

> "Please advise us of your interest one way or the other. Please also keep in mind that, as we do not control the sales of this item, we cannot guarantee exclusive representation to you." (R. 103).

In addition to the foregoing is the fact that later plaintiff was advised, in writing, by Ackerman of Williams Importers that Koerner was "definitely in charge of shipments for the distillery", and therefore he was the man to contact (Plaintiff's Ex. 8, R. 115).

On page 19 of his brief, plaintiff quotes from Mr. Jaburg's deposition (which was never offered in evidence, and therefore is not before the trial Court), a

statement entirely consistent with Ackerman's letter of October 20, 1944 (supra), and adds that the item was not included in "our regular import division" (in which plaintiff was employed), because the "distiller had certain distributors of his own * * * and insisted on appointing his own sales force who acted as brokers and received a brokerage on the sale of this whiskey" (Plaintiff's Brief, p. 19).

We have already called attention to the letter written by Ackerman to plaintiff as far back as February 6, 1945 (a year before the settlement) in which he mentions that defendant corporation was making $1.00 a case profit (Plaintiff's Ex. 11, R. 127).

A Distinction Without a Difference.

Now what are the facts discovered by plaintiff after the settlement?—merely the exact terms of the contract between defendant corporation and the distillery's agent (Plaintiff's Ex. 20, R. 270-282) namely: (1) That defendant's contract was with an agent of the distillery, and (2) the profit to defendant was in the form of a "mark up".

Let us consider these two points briefly:

(1) The contract is with Agencies Distiladores, S.A. The contract recites "Agencias Distiladores" is the "exclusive agent of Duncan Harwood Co., the distiller, for the entire world", and refers to the Harwood Company as its "principal" (R. 271, 277 and 278). As such agent it made the deal with defendant corporation, and provided for all deliveries to be F.O.B. distillery at Vancouver (R. 273).

Where is there any subterfuge here? What difference is there between an agent making a contract for a principal and the principal making one for himself? And how could any distribution between the two be material to the situation of plaintiff when he made his settlement and got the $10,000 that he was in need of?

(2) A reading of the contract between defendant corporation and the agent for the distillery confirms all that Ackerman said in his letter of October 20, 1944 (supra). The contract provides that defendant's compensation in lieu of commissions and all other compensation shall be $1.60 per case (R. 275). The "supplemental" contract between the same parties, required defendant corporation to pay a commission of 60 cents per case to brokers or selling agents "selected by it, but no such broker or selling agent will be selected by agent (defendant corporation) unless and until the written approval of the supplier (the distillery's agent) is first obtained as to each such broker or selling agent." (R. 281). And to clinch the matter, the contract provides that the "supplier shall have the refusal of the customer or the quantity sold by the agent to any wholesaler." (R. 281).

No language in that contract is inconsistent with the representation that defendant corporation was merely doing the clearly and billing for the distillery, which plaintiff says is a misrepresentation. Plaintiff offered no evidence to show that defendant corporation was not paying the 60 cent commission to salesmen selected by the distillery. It offered no evidence that defendant did any more with the Harwood sales than is re-

lated in the letters written to him by Ravaud and Ackerman as heretofore related. Plaintiff admitted that he never ascertained that any salesmen of defendant corporation was selling Harwood in his territory and never even heard any insinuation that there was (R. 227). He knew the whiskey was shipped directly from the distillery to his territory (R. 227 and 264).

In his statement prepared to submit to the Arbitration Board, plaintiff said:

> "Beginning in the autumn of 1944, the wholesale liquor division of R. C. Williams & Co. made direct shipments into my territories of Harwood's whiskey in direct violation of their agreement with me." (R. 253-254).

His statement was based on information secured from defendant corporation and from fact that it invoiced the goods (R. 235).

On recross toward the close of his testimony, plaintiff, in endeavoring to explain the difference between his knowledge of the deal of defendant corporation with the distillery's agent, prior to the settlement, and the knowledge he acquired afterwards, said:

> "They had never used the word, they never told me at no time, that they had sold the merchandise, just like they sold it in Metropolitan New York" (R. 263).

Of course, they didn't sell it like they did in New York, for, as the contract with the distillery's agent shows, the deal with reference to New York City was entirely different than the deal elsewhere in the U.S.

Outside the City of New York, not only did the Distillery agent require payment of commissions up to 60 cents a case to be paid to salesmen approved by it, but it retained the right to pass on the quantity and the identity of the wholesale buyers (R. 281); *whereas, in New York City* it purchased as a wholesaler and retailed the product to *its own customers, and paid its own salesmen,* being permitted to mark up the goods 15% in selling to retailers (R. 276). In other words, there the defendant made the $1.00 profit plus a 15% mark up profit on its sales to its retail customers.

Judge Goodman, after several efforts to tie plaintiff down and find out what his theory on the point was, finally asked:

> "The distinction you are making is the difference between the defendant paying the full purchase price and adding a profit of an additional amount when they sell it, and that differential being paid as a commission directly."

To which plaintiff replied: "That is the distinction." (R. 266).

It is not surprising, therefore, that the trial Judge found that there was no fraud on the part of defendant's officers, and that no misrepresentations had been made by them. (Finding X, R. 29.)

It is not surprising that Judge Goodman, at the close of plaintiff's evidence, commented:

> "In my opinion, so far in this case there isn't the slightest bit of misrepresentation or fraud." (R. 298.)

PLAINTIFF WAS NOT ENTITLED TO ANY COMMISSIONS ON SALES OF HARWOOD AFTER THE SETTLEMENT OF MARCH 8, 1946.

While the record places no emphasis on any claim of plaintiff to commissions on Harwood sales after the settlement of March 8, 1946, some of plaintiff's testimony might be aimed at such a claim. We shall therefore briefly discuss the point.

The complaint alleges the quantity of sales "in the latter part of 1944 and throughout 1945 and *1946*" (Par. VII of the complaint, R. 4) and the prayer is for "commissions payable to plaintiff on the sale of distribution of Harwood whiskey * * * during the years 1944, 1945 and 1946." (R. 8.)

Nowhere does plaintiff's pleading attack the integrity of his new contract of March 8, 1946 (part of Plaintiff's Ex. 17, R. 173). He pleads the contract in Par. X of the complaint (R. 6), and fails anywhere to ask its reformation in any particular.

That contract which is with "Williams Importers" provides that plaintiff will receive a specific commission on various products, *in which Harwood whiskey is not included,* and it carries the additional provision:

> "On any additional products that may be *handled by this division* for sale in your territory, you will receive a commission in an amount to be agreed upon."

Since *Williams Importers* did not handle Harwood sales, it must be obvious that, under that contract,

plaintiff could recover no commissions on Harwood thereafter. He finally resigned at the request of his employer the following April. (R. 194, 243.)

Yet we find here and there in plaintiff's testimony the suggestion by him that the letter of September 13, 1945 (Plaintiff's Ex. 14, R. 150) was not merely a recitation of what Ravaud had said to plaintiff back in *1943,* but a continuing contract that carried on through the settlement into his new contract.

This claim is easily rebutted. At the very moment Jaburg told plaintiff he would give him the letter as to the 1943 conversation, plaintiff quotes Jaburg as saying that plaintiff was not entitled to commissions on Harwood, because *"Williams Importers* did not handle it." (R. 147.) Furthermore, according to his own testimony at the conference with Jaburg, President of defendant corporation about February 25, 1946, the latter told him he, plaintiff, had no claim to commissions on Harwood whiskey. And finally the document which Jaburg signed states that it is confirming a conversation *held in 1943,* and it agrees to nothing. (R. 150.)

And to make the claim still more preposterous, we call the Court's attention to the fact that, on receiving the proposed new contract from Ravaud (Plaintiff's Ex. 17, R. 171-179), plaintiff sent to Ravaud his draft of a proposed contract and he inserted the following provision:

> "No products will be shipped to or sold and delivered in your territory by R. C. Williams & Co.,

> Inc. or by any of its subsidiaries *except through Western Division of Williams Importers,* and upon which you are to receive a commission of 25 cents per case." (R. 182.)

However, his suggestion was ignored and plaintiff signed the contract proposed by Williams Importers without any change, which contract gave him no right to any commissions on sales of Harwood Whiskey. Plaintiff did testify that in the Palace Hotel conference, which was some days prior to the preparation of the settlement agreement and of the new contract, Jaburg, Ravaud and Jacobs gave him assurance that he would be protected against any shipment by R. C. Williams into the western territory. (R. 165, 166, 170.) However, thereafter he signed the settlement agreement in which, in consideration of $10,000 paid him, he waived all claims which he had made *or "might assert in the future on the sales of Harwood whiskey in your territory, as long as this product is not directly handled by the Williams Importers division."* (R. 172.)

CONCLUSION.

It is the law of this State that a Court should exercise with "great caution" the power to set aside a contract.

> *Oppenheimer v. Clunie,* 142 Cal. 313, 318;
> *Greenewalt v. Rogers,* 151 Cal. 619, 635.

In closing we respectfully submit that, if the rule were that applications such as plaintiff's in this case were to be considered with liberality and leniency toward the plaintiff, the trial Court could not have reached any different conclusion than it did.

Dated, San Francisco, California,
November 30, 1949.

Respectfully submitted,
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